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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-402

GEORGE A. OTTO, *Petitioner*

v.

HOUSTON BELT & TERMINAL RAILWAY COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals For The Fifth Circuit

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George A. Otto, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 16, 1971.

CITATIONS TO OPINIONS BELOW

The decision of the Railroad Adjustment Board is printed in Appendix A hereto, *infra*, p. 9.

The judgment of the United States District Court is printed in Appendix B hereto, *infra*, p. 12, and is reported in 319 F. Supp. 262. The *Per Curiam* opinion of the United States Court of Appeals for the Fifth Circuit (consisting of Wisdom, Coleman, and Simpson, Circuit Judges) merely "affirmed" the trial court's judgment, without opinion.

JURISDICTION

The judgment of the Fifth Circuit Court was entered on June 16, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Upon application duly filed therefor, Mr. Justice Stewart extended the time for filing this petition to and including September 24, 1971.

QUESTION PRESENTED

Does the Adjustment Board's decision, grounded on its declaration of impotency, constitute a denial of due process so as to invest the District Court (and this Court) with reviewing authority?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

45 U.S.C. §153 First (j) provides: "Parties may be heard either in person, by counsel, or by other representatives, as they may respectfully elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, George A. Otto, hereinafter called Plaintiff, had been employed by Respondent, Houston Belt & Terminal Railway Company, hereinafter called Defendant, as a railroad switchman for about five years when, on

July 27, 1966, a criminal complaint was filed in Justice Court for Harris County, Texas, accusing plaintiff of the theft of two pieces of pipe. The complaint was later dismissed on August 30, 1966.

On October 20, 1966, defendant conducted an investigative hearing inquiring into the incident. This hearing was scheduled pursuant to a "Memorandum Agreement" between defendant and the Brotherhood of Railroad Trainmen, plaintiff's bargaining agent, which agreement sets forth the procedure for disciplining, suspending, and discharging defendant's employees. The hearing convened to determine whether plaintiff had violated Rule "N" of the Uniform Code of Operating Rules, which governed the conduct of plaintiff and other employees. Rule "N" provides in pertinent part as follows:

> "Employees who are careless of the safety of themselves and others, negligent, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner and handle their personal obligations in such a way that their railroad will not be subject to criticism or loss of goodwill, will not be retained in service."

Plaintiff complained that, at the investigative hearing, he was not allowed legal counsel or even the representative of his own choice; witnesses were not sworn, and the only "proof" of Plaintiff's dishonesty was the criminal complaint, despite the subsequent dismissal of said complaint and the termination of all criminal proceedings against Plaintiff *prior to the hearing*. Brief newspaper clippings concerning Plaintiff and the alleged offense were used as evidence, without more, to show that Defendant was "subject to criticism or loss of good will" within the purview of Rule "N".

Approximately one week after the hearing, plaintiff received a letter from defendant's Superintendent informing him that the evidence showed that he had violated Rule "N" and that for this he was dismissed from defendant's service. Thereafter, plaintiff appealed from the action taken by defendant. The issue of whether or not plaintiff had been unjustly dismissed from the company was submitted to a Public Law Board which was created and constituted in accordance with the Railroad Labor Act, 45 U.S.C. § 151 *et seq.* (1964) (hereinafter referred to as the Act).

On November 20, 1967, Public Law Board No. 89, by majority decision of the three-member Board, denied plaintiff's claim. The Board said:

> "The carrier must be very careful that it is not unfair, unjust, and is not arbitrary in its decisions. *It is not the prerogative of this Board to supplant the decisions of the carrier or substitute our judgment for the judgment of the carrier* . . . We have examined (sic) transcript of the hearing and investigation and find no basis for a charge of prejudice or unfairness. There was ample evidence to find that the claimant violated Rule N . . . The Board finds that dismissal of the claimant was not harsh, arbitrary, or unjust."

Subsequently, plaintiff brought suit in the District Court predicating jurisdiction on 28 U.S.C. § 1337 (1962) and 28 U.S.C. § 1331 (1966).

Plaintiff alleged that he "was arbitrarily deprived by Defendant of a valuable property right, . . . the reasonable expectation of continued future employment, through a hearing so grossly inadequate . . . as to constitute a denial of due process of law in violation of the Fifth Amendment

and also of § 3, First (j) of the Act (45) U.S.C. 153 First (j)." In particular plaintiff contended that the hearing was inadequate in that: (1) plaintiff was denied the right to legal counsel or representation of his own choosing; (2) defendant relied upon the fact that a criminal complaint had been filed against plaintiff as proof of plaintiff's guilt of an offense notwithstanding its subsequent dismissal; (3) Rule "N" for violation of which plaintiff was discharged is vague, indefinite, and without an ascertainable standard of guilt. Moreover, plaintiff contended that the Adjustment Board misconceived its own function and abdicated its adjudicative power by declaring that *"It is not the prerogative of this Board to supplant the decisions of the carrier or substitute our judgment for the judgment of the carrier."* In so declaring, plaintiff contends, the Board denied him fundamental due process, both procedural and substantive.

On Defendant's motion to dismiss, the trial court concluded that it was without jurisdiction to hear Plaintiff's claim, apparently because the hearing before the Board was not shown to be lacking in impartiality and due process. Plaintiff moved the Court for a rehearing, which was denied, and thereafter duly filed his appeal to the United States Court of Appeals for the Fifth Circuit, which merely "affirmed" the District Court on June 16, 1971.

REASONS FOR GRANTING WRIT

It is a hoary principle indeed that the Adjustment Board's decisions are final and binding—unless the Board's procedures are wholly baseless or lacking in due process. See *Gunther v. San Diego & A.E. R.R.*, 382 U.S. 257 (1965). As long as the hearing before the Board is im-

partial and consistent with the requirements of due process, the Board's decision cannot be impugned just because it relies upon evidence adduced at the procedurally defective preliminary hearing. *Edwards v. St. Louis-San Francisco R.R.*, 361 F.2d 946 (7th Cir., 1966). *Rosen v. Eastern Air Lines, Inc.*, 400 F.2d 462 (5th Cir., 1968), cert. den., 394 U.S. 959, declares at 463-4:

> ". . . the courts can reverse the System Board only where there is a denial of due process before the Board and that such a review does not extend to proceedings before submission to the Board . . . There are, however, very limited situations in which following the actions of a system board, authorized by the Railway Labor Act (supra), court review is available. These can arise only where there has been a denial of due process by some act of the Board in making an award . . ."

It appears trite but necessary to state that *due process* is a living, expanding principle enjoying a preferred position in our constitutional value system. "Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due Process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in issuing fundamental justice, it is also a living principle not confined to past instances." Frankfurter, J., in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 173-4.

The gist of Plaintiff's contention that the Board itself abridged Plaintiff's rights to procedural fairness is the Board's expression of its basic role, upon which foundation its other findings rest:

> *"It is not the prerogative of this Board to supplant the decisions of the carrier or substitute our judgment for the judgment of the carrier."* (Record, p. 9).

If the Board cannot supplant the decisions of the carrier, why can it ignore the decisions of the worker? Why should the decisions of one party to a dispute be unassailable, and not the other? Is this Board's attitude of such unbiased and dispassionate character as to accord the worker a fair shake, much less "due process"? If the Court defers to the Board, and the Board regards itself as impotent to modify the judgment of the carrier, then, in effect, the carrier's judgment is final and infallible and the worker is dispossessed of any *right* to challenge it. There is, accordingly, no meaningful adjudication at either the administrative or the judicial level.

In effect, then, the carrier's decision that Plaintiff was dishonest within the meaning of Rule N—merely on the basis of a criminal complaint being filed against Plaintiff, notwithstanding its subsequent dismissal prior to any hearing—was sanctified by the Board's refusal to evaluate its fairness, and the District Court's perfunctory deference to the Board. Likewise, the constitutional validity of Rule "N" 's proscription against employees' conduct which might cause their railroad "criticism or loss of goodwill" was never examined at either the administrative or judicial level. Surely it is implicit in the notion of "due process" that administrative proceedings, no matter how summary or informal, must be unbiased in seeking to adjudicate disputes and ascertain the truth—and NOT be deferential to one party, but olympian to the other.

CONCLUSION

Because the Courts below, as well as the Adjustment Board, have studiously failed to evaluate Petitioner's accusation that the Board's actions are seriously defective in automatically granting one party to dispute a privileged and superior status, thereby denying the opposing party its right to due process, this Petition for a Writ of Certiorari should be granted.

BEN G. LEVY
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Houston, Texas 77025
(713) 665-7824

CERTIFICATE OF SERVICE

I hereby certify that on this, the _____ day of September, 1971, true and correct copies of the foregoing Petition for Writ of Certiorari were served upon counsel for Respondent, Tommy B. Duke, by mailing same to him through the United States mail, postage prepaid, at the following address: 9th Floor, Bank of the Southwest Building, Houston, Texas, 77002.

Ben G. Levy
Attorney for Petitioner

APPENDIX A

ASE NO. 1
AWARD NO. 1

PUBLIC LAW BOARD NO. 89

PARTIES TO DISPUTE

BROTHERHOOD OF RAILROAD TRAINMEN

THE HOUSTON BELT & TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Yardman G. A. Otto for all pay lost from the service of the company, October 27, 1966 and each subsequent date with vacation and seniority rights unimpaired, account of being unjustly dismissed from the company.

FINDINGS: Claimant herein has requested reinstatement with vacation and seniority rights unimpaired and pay for time lost. Both parties have made several contentions. The organization presented evidence that proper notice was not given; that the charges were not specific; that the carrier failed to carry the burden of proof of guilt of the claimant; that the claimant did not receive a fair and impartial investigation and that the investigation was not held within ten days time limit as required by the Agreement. On the other hand, carrier contends that the claimant did not appeal his case as provided by the time limit rule under the Agreement; that the claimant further modified his claim by a request for reinstatement on a leniency basis. Carrier further alleges that the organization does not have the right to represent the claimant because of claimant's letter withholding representation rights.

At the outset the claim would be barred by the time limit rule except for the timely action of the organization in appealing the claim despite the claimant's letter attempting to deny their representation. The appeal is timely and we will consider the claim on its merits.

We find that the notice given was more than sufficient to advise claimant what specifically he was being charged with and that the carrier acted timely in setting a date for the investigation. An investigation of this nature is not bound by the same rules of evidence or the same rules of law as required in a court of criminal law. It is only necessary that there is sufficient evidence for the Carrier to find that claimant was guilty of the infraction as charged. The carrier must be very careful that it is not unfair, unjust, and is not arbitrary in its decisions. It is not the prerogative of this Board to supplant the decisions of the carrier or substitute our judgment for the judgment of the carrier. The organization has prepared an excellent brief and challenged every point that could be challenged but we find no valid basis for overturning carrier's decision.

We have examined transcript of the hearing and investigation and find no basis for a charge of prejudice or unfairness. There was ample evidence to find that the claimant violated Rule N, which reads:

> "Employees who are careless of the safety of themselves and others, negligent, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner and handle their personal obligations in such a way that their railroad will not be subject to criticism or loss of good will, will not be retained in service."

The Board finds that dismissal of the claimant under the circumstances was not harsh, arbitrary or unjust.

AWARD: Claim denied.

PRESTON J. MOORE
Preston J. Moore, Chairman

R. D. JONES—Dissent
R. D. Jones, Employee Member

R. W. BEST
R. W. Best, Carrier Member

APPENDIX B

MEMORANDUM AND ORDER

(Number and Title Omitted) (Filed Sept. 30, 1970)

Plaintiff, George A. Otto, had been employed by defendant, Houston Belt & Terminal Railway Company, as a railroad switchman for about five years when, on July 27, 1966, a criminal complaint was filed in Justice Court for Harris County, Texas. Essentially, the complaint accused plaintiff of the theft of two pieces of pipe. The complaint was later dismissed on August 30, 1966.

On October 20, 1966, defendant conducted an investigative hearing inquiring into the incident. This hearing was scheduled pursuant to a "Memorandum Agreement" between defendant and the Brotherhood of Railroad Trainmen, plaintiff's bargaining agent, which agreement sets forth the procedure for *disciplining*, suspending, and discharging defendant's employees. The hearing convened to determine whether plaintiff had violated Rule "N" of the Uniform Code of Operating Rules, which governed the conduct of plaintiff and other employees. Rule "N" provides in pertinent part, as follows:

> "Employees who are careless of the safety of themselves and others, negligent, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner and handle their personal obligations in such a way that their railroad will not be subject to criticism or loss of goodwill, will not be retained in service."

Plaintiff complains that, at the investigative hearing, he "was not allowed legal counsel, or even the representative of his choice; witnesses were not sworn . . ." and he further

complains that the only evidence adduced against him was the fact of the criminal complaint and several newspaper clippings concerning plaintiff and the alleged offense.

Approximately one week after the hearing, plaintiff received a letter from defendant's Superintendent informing him that the evidence showed that he had violated Rule "N" and that for this reason he was dismissed from defendant's service. Thereafter, plaintiff appealed from the action taken by defendant. The issue of whether or not plaintiff had been unjustly dismissed from the company was submitted to a Public Law Board which was created and constituted in accordance with the Railway Labor Act, 45 U.S.C. §151 *et seq.* (1964) (hereinafter referred to as the Act).

On November 20, 1967, Public Law Board No. 89, by a majority decision of the three-member Board denied plaintiff's claim. The Board said:

> "We have examined [sic] transcript of the hearing and investigation and find no basis for a charge of prejudice or unfairness. There was ample evidence to find that the claimant violated Rule "N" . . . The Board finds that dismissal of the claimant under these circumstances was not harsh, arbitrary or unjust."

On December 4, 1969, plaintiff brought suit in this Court predicating jurisdiction on 28 U.S.C. §1331 (1966) and 28 U.S.C. §1337 (1962).

Plaintiff alleges that he "was arbitrarily deprived by Defendant of a valuable property right, . . . the reasonable expectation of continued future employment, through a hearing so grossly inadequate . . . as to constitute a denial of due process of law in violation of the Fifth

Amendemnt and also of §3, First (j) of the Act (45 U.S.C. 153 First (j))."[1] In particular plaintiff contends that the hearing was inadequate in that: (1) plaintiff was denied the right to legal counsel or representation of his own choosing; (2) defendant relied upon the fact that a criminal complaint had been filed against plaintiff as proof of plaintiff's guilt of an offense; (3) Rule "N" for violation of which plaintiff was discharged is vague, indefinite, and without an ascertainable standard of guilt.

Presently, this cause is before the Court on defendant's motion to dismiss. Defendant contends that the complaint should be dismissed because: (1) it is barred by the statute of limitations; (2) the award of Public Law Board 89 is final and binding on the parties; and (3) plaintiff's contention of denial of due process and insufficient evidence do not under the circumstances of this case present claims upon which relief can be granted.

Section 153 First (r) provides:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrued under the award of the division of the Adjustment Board, and not after." 45 U.S.C. §153 First (r) (Supp. 1970).

The facts of the limitation issue have not been resolved (see letter of June 16, 1970, from plaintiff's attorney), but for the reasons stated in the balance of this

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1. Section 153 First (j) provides: "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

opinion, the Court is of the opinion that defendant's motion to dismiss is well taken.

There is authority to the effect that a claim of denial of due process is not barred by limitations. See *Gordon v. Eastern Air Lines, Inc.*, 268 F.Supp. 210 (W.D. Va. 1967).[2] In *Gordon*, plaintiff was dismissed from his employment because of his "overall employment record and lack of responsibility as an employee." After various preliminary hearings and a final Board determination, plaintiff sought review in Federal District Court. He attacked the Board's decision on the merits contending that "any misconduct on his part which the Board could consider was not serious enough to justify his dismissal." He also contended that he had been denied due process by "certain alleged irregularities in the administrative procedure—the improper admission of his past employment record and the failure to advise him of his right to counsel in the original hearing on his discharge . . ."

After determining that a review on the merits was barred by limitations, the court went on to say:

> "Notwithstanding the inability of a district court to review the present case on its merits, it is true that the Court may examine the administrative proceedings that have occurred to see whether plaintiff's due process rights have been violated." Id. at 214.

The *Gordon* court then went on to dismiss plaintiff's suit, pointing to the limited nature of district court review in these types of cases.

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2. Although this case involved a hearing before an airlines adjustment board, the court ruled that the Railway Labor Act applied. Therefore, this decision is pertinent to the case at hand.

> "Under the principles established by Gunther v. San Diego and Arizona Eastern Railway Co., 382 U.S. 257 . . . (1965), a district court . . . should not set aside a decision of a system board of adjustment unless it is 'wholly baseless and without reason.'" Id. at 214.

Admittedly, judicial review of the merits of a Board decision is narrow.[3] But, whether such a standard of review should apply to a claim of denial of due process is questionable. Perhaps the *Gordon* case is better understood in light of the fact that plaintiff's allegations of denial of due process were directed at the shortcomings of a preliminary hearing rather than the proceedings before the Board.

In *Edwards v. St. Louis-San Francisco RR.*, 361 F.2d 946 (7th Cir. 1956), *cited in Gordon v. Eastern Air Lines, Inc., supra,* at 214, the court held that where the alleged denial of due process occurs during the initial hearing by the employer on railroad property rather than any proceedings before the Adjustment Board, the court is without jurisdiction to review the decision of the Adjustment Board.

> "The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigative hearing on railroad property." I.D. at 953.

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3. In *Gunther v. San Diego & A.E. R.R.*, 382 U.S. 257 (1965), the Supreme Court ruled that the decision of an Adjustment Board should not be set aside unless it was wholly baseless and completely without reason. The courts should not preempt the function of the Adjustment Board by reviewing the Board's determination of the merits or by placing its own interpretation on a collective bargaining agreement. Thus, the court's review is limited to situations where the Board's procedures were lacking in due process or the Board's decision is wholly baseless and completely without reason.

See also *D'Elia v. New York, N. H. & H. R.R.*, 230 F. Supp. 912 (D. Conn.), *aff'd*, 338 F.2d 701 (2nd Cir. 1964), for the proposition that as long as the final hearing before the Board is impartial, the requirements of due process have been satisfied. "The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ." *Brooks v. Chicago R. I. & P. R.R.*, 177 F.2d 386, 391 (8th Cir. 1949).

It is equally clear that as long as the hearing before the Board is impartial and consistent with the requirements of due process, the Board's decision cannot be impugned just because it relies upon evidence adduced at the procedurally defective preliminary hearing. *Edwards v. St. Louis-San Francisco R.R., supra.*

Thus, this Court is forced to conclude that it is without jurisdiction to hear plaintiff's claim. He complains of the initial hearing held pursuant to the "Memorandum Agreement" between defendant and the union. He does not complain of the hearing before the Board. If plaintiff wishes to question the propriety of the initial hearing, his claim must be based on the provisions of the collective bargaining agreement relating to that subject.

> "The federal courts are not the guarantors of any rights of either labor or management at the initial hearing, either by force of the Constitution or the Railway Labor Act, for, as we have said, at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them." 361 F.2d at 954. (Footnote omitted.)

Plaintiff has made no contention that the hearing conducted by defendant violated the "Memorandum Agreement:" If plaintiff were making such a contention, he would have had to previously present the contention to the Adjustment Board. Our review of that decision, being on the merits, would be governed by the extremely narrow standards of review followed in these cases. However, this line of discussion is academic, since plaintiff has not complained of a violation of the collective bargaining agreement.

Therefore, for the reasons stated above, defendant's motion to dismiss should be, and it is hereby, granted.

The Clerk will notify counsel for defendant to draft an appropriate judgment in accordance with this Memorandum and Order for submission to the Court by the ____ day of _____, 1970, after first obtaining approval of opposing counsel as to form.

DONE at Houston, Texas, this _____ day of September, 1970.

s/ John V. Singleton Jr.
United States District Judge